Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	EB Docket No. 17-245
Amendment of Procedural Rules Governing	)	
Formal Complaint Proceedings Delegated to the	)	
Enforcement Bureau	)	

COMMENTS OF VERIZON

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COMMENTS OF VERIZON[1]

The Commission proposes several amendments to its procedural rules that will improve the enforcement process. As it proposes, the Commission should harmonize the procedural rules that apply to Section 208 formal complaints, Section 224 pole attachment complaints, and disability access complaints. In some cases, it should make other changes to those rules to promote fairness, such as providing a longer period to answer formal complaints. The Commission also should adopt shot clocks in these complaint proceedings to ensure expeditious resolutions, similar to those it already has proposed for pole access complaints.

The Commission also should initiate broader reform of its enforcement procedures to promote fairness, due process, and transparency. For example, it should discontinue its recent misapplication of the continuing violation theory. It should publish a manual with its enforcement procedures, so that all parties know how the Commission will handle enforcement matters. It should provide drafts of Notices of Apparent Liability (NAL) to investigation targets and allow those targets to respond before the Commission votes on the NAL. And it should require a vote on consent decrees at the request of any two commissioners.

[1] The Verizon companies participating in this filing are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

I. Establish a Shot Clock for Complaint Proceedings.

The statutory requirement to resolve within five months complaints under Section 208(b)—in general, complaints related to the lawfulness of tariffed matters—leads to efficient and prompt resolutions.[2] But other complaints not subject to deadlines can languish. In light of concerns about the time it takes for the Commission to resolve pole attachment complaints, the Commission recently proposed a 180-day shot clock to resolve pole access complaints under Section 224.[3] The Commission should adopt that proposal[4] and should extend it to all formal complaints not already under a deadline, including complaints under Sections 208(a) and 224 and disability access complaints.

A 180-day shot clock would set an efficient timeline. Complainants reasonably expect timely resolution of their complaints. Concerns that the Commission will take an unreasonable amount of time to resolve a complaint create a disincentive for parties to bring legitimate complaints in the first place. And if companies think the Commission will take an unreasonably long time to resolve complaints, they have a perverse incentive to continue unjust and unreasonable practices.

One hundred eighty days—six months—should be enough time for the Commission to resolve most complaints. But some complaints are complex enough that they require more time. At an initial status conference, the parties and Staff could discuss whether, for good cause, a complaint case should be on a longer clock. In a scheduling order, the Enforcement Bureau with

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[2] 47 U.S.C. § 208(b)(1).

[3] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266, ¶¶ 47-51 (2017) ("*Wireline Infrastructure NPRM*").

[4] *See* Comments of Verizon, WC Docket No. 17-84, at 15-16 (June 15, 2017).

the parties' agreement could decide whether a case stays on the 180-day clock or instead should be on a longer clock, such as a 270-day clock.

The shot clock should begin when the complainant files the complaint. Under the Commission's rules, both parties will submit legal analyses and material facts in plenty of time to issue an order within the shot clock's deadline. There sometimes may be unforeseen circumstances that could necessitate a pause in the clock.[5] But that should be the exception, not the rule, and it should occur only sparingly.

II. Harmonize the Procedural Rules Governing Complaints.

Seeking to "simplify and clarify" the procedural rules that apply to complaints, the Commission proposes revisions that would harmonize the rules applicable to complaints that the Market Disputes Resolutions Division (Sections 208 and 224 complaints) and the Telecommunications Consumers Division (disability access complaints) manage.[6] Observing that the Section 208 rules have worked well to resolve disputes between carriers, the Commission uses them as a starting point for its proposals. But, in some cases, the Commission proposes to modify them in favor of the existing pole-attachment complaint rules. And elsewhere it proposes to retain specific pole attachment rules unique to those complaints.

Many of the Commission's specific proposals are improvements. The Commission should make a few adjustments in its final rules:

Filing Deadlines. The Commission proposes that answers to formal complaints be due 30 days from service of the complaint and that replies be due within 10 days of the answer. The 30-day deadline to answer is consistent with the existing process for pole attachment complaints.

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[5] *See Wireline Infrastructure NRPM*, ¶ 49.

[6] *Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, Notice of Proposed Rulemaking, 32 FCC Rcd 7155, ¶ 7 (2017) ("*NPRM*").

While we agree the existing 20-day deadline to answer complaints under Sections 208 and 255 often is too short and that a uniform deadline should apply to all formal complaints, the Commission's proposal still would not afford respondents enough time in many cases. Unlike the federal courts, which use a notice pleading system, the Commission requires fact-based pleadings. Under the Commission's rules, a carrier answering a complaint cannot offer general denials. It must instead provide detailed, fact-based admissions and denials.[7] Answering a complaint in this system is burdensome and time-consuming, far more so than in the federal courts, where the default answer deadline is 21 days.[8] Answers in complaint proceedings generally are as detailed and fact-intensive as the complaints. The complainant can take all the time it needs to meet the Commission's detailed requirements for filing a complaint, limited only by the applicable statute of limitations. To prepare a similarly rigorous, detailed answer—including a detailed legal analysis—respondents should have more time than 30 days.

We propose a 45-day deadline to respond to complaints. Basic fairness and due process require that respondents have enough time for an appropriate response, and 45 days would strike an appropriate balance, allowing complaint proceedings to move at an efficient pace while affording respondents enough time to answer in sufficient detail to comply with the Commission's requirements.

Although the Commission does not routinely grant extensions of time,[9] in some circumstances, parties may need more than 45 days to answer a complaint. If a party receives an

[7] *See* 47 C.F.R. § 1.724(b).

[8] Fed. R. Civ. P. 12(a)(1)(A).

[9] *See* 47 C.F.R. § 1.46.

extension of time, however, that would be a reason to pause the shot clock for a corresponding amount of time.

Information Designations. The Commission proposes to extend its information designation requirements to pole attachment complaints and to align them more closely with the requirements in Federal Rule of Civil Procedure 26.[10] In general, information designations identify individuals with firsthand knowledge of facts and documents relevant to the facts.

Although the Commission has tentatively concluded they are a beneficial part of the complaint process, information designations actually add very little to complaint proceedings. In the federal courts, information designations identify individuals whom parties might want to depose as part of pre-trial discovery. Here, however, there are no depositions. Nor are there hearings at which a party might call as a witness someone listed in an information designation. So a description of the individuals with knowledge of facts does not provide opposing parties with actionable information, and it does not help the Commission resolve complaints.

At a minimum, the Commission should eliminate the requirement to list individuals with knowledge in an information designation. And if the Commission retains the information designation requirement at all, it should limit the required disclosure to documents relevant to the facts. Unlike designation of individuals, designation of documents in a complaint proceeding can help parties focus their discovery.

Accelerated Docket: The Commission proposes to consolidate its Accelerated Docket procedures into one new rule, give staff greater flexibility, and extend the Accelerated Docket to pole attachment cases. If the Commission retains the Accelerated Docket at all, then the Commission's proposals make sense from an administrative standpoint.

[10] *NPRM*, ¶ 10.

But if the Commission adopts a shot clock for all formal complaints, it should consider whether the Accelerated Docket is still necessary. In 2011, the Commission declined to extend the Accelerated Docket to disability access complaints. Congress in the 21st Century Communications and Video Accessibility Act had established a 180-day deadline to resolve informal complaints, and the Commission determined that 180-day timeframe was an "adequate substitute for formal Accelerated Docket complaints."[11] The Commission not only found the Accelerated Docket was no longer necessary, it also found it "may impose an unnecessary restriction on the formal complaint process where, as discussed above, the process involves, among other things, filing of briefs, responses, replies, and discovery."[12]

With a shot clock in place, the Commission's reasons for not applying the Accelerated Docket in the disability access context would also apply to formal complaints under Sections 208 and 224. And in Verizon's experience the Enforcement Bureau rarely accepts complaints for Accelerated Docket treatment. The Commission should consider eliminating it.

Other Changes: The Commission proposed relatively minor changes to several other procedural rules, which we support.

- *Discovery*: The Commission should extend discovery to pole attachment proceedings and do away with the need to request permission before issuing discovery requests.
- *Proposed Findings of Fact and Law*: The Commission should abolish this unnecessary filing requirement, which routinely is waived as a matter of practice today.

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[11] *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*; *et al*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 14,557, ¶ 274 (2011).

[12] *Id.*

- *Five-Month Cases*: The Commission should codify the pre-complaint procedures that are part of its standard practice.
- *Settlement Discussions and Mediation*: The Commission should require pre-filing settlement discussions at the executive level in all formal complaints to avoid unnecessary filings and litigation and promote a more efficient dispute resolution process.

Status Conferences: The Commission should extend the availability of initial status conferences to pole attachment complaints.

III. Curtail the Continuing Violation Theory.

The *NPRM* focuses on procedural rules that apply to formal complaints. But the Commission also should improve its procedures that apply to Enforcement Bureau investigations more generally. The fairness and transparency with which the Commission conducts those proceedings would benefit from a thorough review and reform of the applicable enforcement procedures. Chief among the procedures the Commission should reform is its misuse of the continuing violation theory to extend unlawfully statutes of limitations.

Statutes of limitations encourage prompt resolution of disputes and establish what, in Congress's judgment, are reasonable periods to do so. Various statutes of limitation apply to Commission actions. For example, Section 415 ("Limitations as to Actions")—which applies to recovery of charges from carriers—has a two-year limitations period.[13] And Title V includes a one-year limit on Commission forfeitures.[14]

[13] *See* 47 U.S.C. § 415.

[14] *See id.* § 503.

Often, Commission decisions about whether a violation "continues" (*i.e.*, is ongoing) for some period are key to whether the violation falls within a limitations period. In the past, the Commission has correctly applied the rule for determining when a violation occurs and whether it is continuing.[15] But more recently, the Commission has adopted an overly expansive view of continuing violations, particularly in forfeiture proceedings, asserting that failure to right virtually any wrong is a "continuing violation" that effectively tolls a limitations period.

For example, the Commission has asserted the right to treat retention of E-rate funds and the failure to correct errors (including unintentional mistakes) on Commission forms as continuing violations in forfeiture proceedings. In *VCI Company*, the Commission said it disagreed with its prior rulings regarding what constitutes a continuing violation.[16] Without citing authority for its reversal, the Commission asserted that VCI's failure to file accurate forms had "a continuing harmful impact" and that VCI "continued to benefit" from the overpayments it received.[17] This led the Commission to conclude that the statute of limitations in Section 503(b)(6)(B) "does not begin to run until the violation is cured."[18]

The Commission should not consider a failure to fix a wrong as a distinct violation that continues until cured. That position conflicts with the well-settled rule that "the mere failure to right a wrong and make plaintiff whole cannot be a continuing wrong which tolls the statute of

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[15] *See*, *e.g.*, *In re Baton Rouge Progressive Network*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 905, ¶ 20 (2010) ("the statute of limitations for proposing a forfeiture is one year from the date of violation. The Commission has held that a false or misleading statement made at one point in time is not a 'continuing violation' for purposes of Section 503(b) simply because it was not corrected." (internal citations omitted)).

[16] *See VCI Co.*, Notice of Apparent Liability for Forfeiture and Order, 22 FCC Rcd 15,933, ¶ 20 (2007) ("*VCI Company*").

[17] *Id*.

[18] *VCI Company*, ¶ 20.

limitations, for that is the purpose of any lawsuit and the exception would obliterate the rule."[19] The Fifth Circuit has held that this traditional understanding[20] of when an offense occurred applies to forfeitures sought for alleged violations of the Communications Act. As the court explained, although "the *effect* of this failure to act within the prescribed period persists, the violation itself cannot be said to 'occur' each day thereafter."[21]

The courts would not uphold the Commission's recent, misguided application of the continuing violation theory. Going forward, the Commission should self-correct.

IV. Additional Reforms to the Enforcement Process Would Further Promote Fairness, Due Process, and Transparency.

A. Publish Enforcement Procedures.

One basic step that the Commission should take to enhance transparency is to publish its enforcement and investigations procedures. Other investigative agencies, including the Federal Trade Commission[22] and the Securities and Exchange Commission (SEC),[23] publish their enforcement manuals. But, as the Government Accountability Office (GAO) has noted, the FCC does not publish a similar document on its website outlining its enforcement policies and processes.[24]

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[19] *Fitzgerald v. Seamans*, 553 F.2d 220, 230 (D.C. Cir. 1977).

[20] See *United States v. WIYN Radio, Inc.*, 614 F.2d 495, 496-97 (5th Cir. 1980).

[21] *Id.*, at 497.

[22] FTC Administrative Staff Manuals, https://www.ftc.gov/about-ftc/foia/foia-resources/ftc-administrative-staff-manuals.

[23] Office of General Counsel, SEC Division of Enforcement-Enforcement Manual, https://www.sec.gov/divisions/enforce/enforcementmanual.pdf

[24] GAO, *TELECOMMUNICATIONS: FCC Updated Its Enforcement Program, but Improved Transparency Is Needed*, at 24 (Sept. 2016), http://www.gao.gov/assets/690/687171.pdf.

As GAO explained, the published manuals "provide information about the enforcement process as well as brief summaries to explain agency regulations to help ensure the clarity of both."[25] The Commission's failure to publish its procedures detracts from the transparency of its enforcement efforts. It should remedy that by following GAO's recommendation and "establish, and make publically available, a communications strategy outlining the agency's enforcement program for external stakeholders, to improve engagement with the telecommunications community on the purposes, objectives, and processes the Enforcement Bureau employs to achieve its mission."[26]

B. Provide an Opportunity To Respond to Draft Notices of Apparent Liability Before the Commission Votes To Adopt.

In addition, the Enforcement Bureau should provide draft NALs to enforcement targets and allow them an opportunity to respond before the Commission votes to proceed with a public NAL. An NAL is a public document that makes preliminary findings of fact and law regarding alleged wrongdoing.[27] The NAL is not a final decision but it nonetheless can cause reputational harm to the target company. The Commission also has cited NALs—inappropriately, in our view—as controlling precedent in its decisions.[28] And the Commission has no deadline to act on an NAL, so that NALs sometimes can be pending for a long time before the Commission decides whether to impose a forfeiture. It is only fair that the target of an NAL has an opportunity to

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[25] *Id*.

[26] *Id.*, at 27-28.

[27] *See* 47 C.F.R. § 1.80.

[28] *See*, *e.g.*, *VCI Company*, ¶ 20 (admittedly "changing course" and finding for the first time that failing to file a Form 497 constitutes a "continuing violation"); *Purple Commc'ns, Inc.*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 5491, ¶ 34 n.87 (2014) (citing *VCI Company* as the sole support for the Commission's conclusion that entity's inaccurate submissions to the Telecommunications Relay Service constituted a continuing violation).

address the allegations before they are made public, which also will likely lead to a better, more focused, NAL.

As with the publication of enforcement manuals, other agencies have adopted fairer, more transparent procedures. For example, the SEC provides enforcement targets with a "Wells" notice, which gives them information about the investigation and affords them an opportunity to submit a statement to the SEC before SEC staff recommends to the full commission whether it should begin an investigative proceeding. Through its Wells process, the SEC has the opportunity to hear both sides' arguments before it votes to commence a proceeding. The Commission should adopt a similar practice and allow targets of enforcement actions to see and respond to draft NALs. This would only improve due process.

C. Require Full Commission Vote on Consent Decrees Upon the Request of Any Two Commissioners.

Also, the Commission's rules should require a full Commission vote on consent decrees upon request of any two commissioners. This would be consistent with Commissioner O'Rielly's recent proposal to modify how the Commission delegates authority and would "allow Commissioners to have greater say in the workings of the Commission and prevent[] process abuses and unnecessary delays."[29]

Requiring a Commission vote under these circumstances would also ensure the full Commission has the opportunity to weigh in on significant or novel issues of law or procedure as identified by two Commissioners. This requirement would scale back delegated authority in matters that deserve to be in front of the full Commission.

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[29] Michael O'Rielly, Commissioner, to FCC BLOG, *A Modified Delegated Authority Proposal*, https://www.fcc.gov/news-events/blog/2017/02/22/modified-delegated-authority-proposal (Feb. 22, 2017, 11:26 EST).

Respectfully submitted,

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